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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 650

FUHRMAN & FORSTER COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

RAYFORD W. LEMLEY,
Attorney for Petitioner.

THE GUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

Your petitioner, Fuhrman & Forster Company, respectfully prays for the allowance of a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review the decision of that court entered in the above case on July 22, 1940. A petition for rehearing was denied by that court on October 1, 1940.

STATEMENT OF THE MATTER INVOLVED.

This proceeding involves a claim for refund of $260,075.15 paid as processing taxes under the Agricultural Adjustment Act. (c. 25, 48 Stat. 31). A part of the amount in controversy was paid by petitioner directly to the United States, pursuant to a demand by the Collector of Internal Revenue, Chicago, Illinois (hereafter referred to as the Collector). The larger balance was paid, as directed by the United States, to C. A. Burnette Company, a public abattoir, whom petitioner had engaged to slaughter its hogs for a fee, who in turn remitted this money to the Collector.

After this Court had held the Agricultural Adjustment Act unconstitutional, Congress attempted to provide an exclusive remedy for the refunding of the processing taxes illegally exacted. The remedial statute was known as Title VII of the Revenue Act of 1936 (c. 690, 49 Stat. 1648, 1750. I. R. C. 507-15), hereafter referred to as Title VII.

Petitioner duly filed its claim for refund (P. T. Form 79) with the Collector on June 30, 1937. On June 3, 1938, the Commissioner of Internal Revenue (hereafter referred to as the Commissioner or the Respondent) rejected this claim in full under the theory that petitioner was not such a person (processor or taxpayer) to whom Title VII authorized a refund. (R. 9.) None of the taxes in controversy have been refunded.

A petition for review was filed with the United States Processing Tax Board of Review (hereafter referred to as the Board) on September 1, 1938. (R. 3.) The Board entered its first order of dismissal for want of jurisdiction on February 23, 1939, three members of the Board dissenting thereto. (R. 52.)

On April 24, 1939, an amended petition was filed by your petitioner. (R. 42.) The Board vacated its order of dismissal on May 11, 1939. (R. 53.) Respondent again filed a motion to dismiss, and again the Board entered an order of dismissal on September 28, 1939. (R. 53.) To the last order, three members of the Board again dissented, expressing the view that the Board had jurisdiction to entertain that proceeding. (Memorandum opinions, R. 54, 55, 56, and 57.)

The case was brought to the United States Circuit Court of Appeals for the Seventh Circuit by a petition for review, filed December 26, 1939, pursuant to Section 906 (g) of Title VII of the Revenue Act of 1936.

On December 26, 1939, three other petitions for review were filed with the United States Circuit Court of Appeals for the Seventh Circuit, identified as Vette & Zuncker Company, Inc., Docket No. 7173; United Butchers Packing Company, Docket No. 7174; and Zuegel Packing Company, Docket No. 7175. As all of the foregoing cases were virtually identical with that of Fuhrman & Forster Company, and all represented by the same attorney, the United States Circuit Court of Appeals for the Seventh Circuit, upon motion duly made, ordered that its decision in the case of Fuhrman & Forster Company, petitioner on review, would be held controlling in all of the other three cases. (R. 82.)

A motion for a stay of mandate in the other three cases will be duly filed with the Circuit Court of Appeals, pending the decision of this Court in this proceeding.

The decision of the Board, dismissing the petition for lack of jurisdiction, affirmed by the Circuit Court of Appeals, leads to the conclusion that no person has a legal right to recover the processing tax in controversy. The public abattoir may not recover because it bore no part of the burden of this tax, and petitioner may not recover, even if it bore the full burden thereof, because it was not

the taxpayer, nor the person upon whom the tax was imposed.

The petitioner takes the position that it was the taxpayer upon whom the processing tax was imposed under the Agricultural Adjustment Act, and, having paid part of the taxes in controversy directly to the United States, and the balance directly to the "collection agent" specified by an officer of the United States, that it is entitled under the law to a recovery, at least to the extent of the tax burden borne by it and not shifted to others.

Petitioner also takes the position that whether or not it was the taxpayer who was obliged to pay the tax imposed under the Agricultural Adjustment Act, it was a proper claimant under Title VII, as Congress clearly intended a remedy to those who immediately bore the burden of the tax prior to the first movement of the taxed commodity by a sale thereof into the channels of trade. Therefore, if a public abattoir was the taxpayer, both the agent and the owner have a right of recovery under the Act to the extent of the tax burden borne.

Therefore, whether as taxpayer or the one who actually paid the tax before the commodity moved into the channels of trade, the Board had jurisdiction to entertain this proceeding in its entirety if Title VII, a remedial statute, is liberally and equitably construed.

Petitioner believes that it has presented to the Board and the courts, for the first time, the error of the Respondent occurring early in 1934, which was the beginning of a chain of events that has caused great, but avoidable, hardship to petitioner and others similarly circumstanced. The problem here has become involved solely as a result of a super-structure built upon the alleged false foundation of an improper administrative ruling. The probability is that greater damage must follow until the rights of the parties have been determined by a decision of this Court.

DECISION OF THE CIRCUIT COURT OF APPEALS.

The decision of the United States Circuit Court of Appeals for the Seventh Circuit, affirming the order of dismissal of the United States Processing Tax Board of Review, will be found in the record on pages 87 to 94, inclusive. On October 1, 1940, that court entered an order denying a petition for rehearing. (R. 95.)

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

The writ of certiorari should be granted in this case for the four reasons, which are more particularly presented in the order stated in the following summary.

I. There is a present conflict between two Circuit Courts of Appeal in the same matter.

II. The Circuit Court of Appeals for the Seventh Circuit in the instant case has decided a federal question in a way in conflict with applicable decisions of this Court and other federal courts.

III. The Circuit Court of Appeals has decided an important question of federal law which has not been, but should be settled by this Court.

IV. Title VII of the Revenue Act of 1936 is unconstitutional as construed by the Circuit Court of Appeals, as it does not provide an adequate remedy, and conflicts with the Fifth Amendment to the Constitution of the United States.

I.

There is now a conflict between the Circuit Court of Appeals for the Second and Seventh Circuits as to whether the United States Processing Tax Board of Review or the federal courts have jurisdiction to review the Commissioner's determination on particular claims for refund of processing taxes paid.

In the case of *Trunz Pork Stores, Inc.* v. *Rasquin*, 100 Fed. (2d) 399, decided December 5, 1938, the Circuit Court of Appeals for the Second Circuit held that the United States District Courts were without jurisdiction to review a claim for refund of processing taxes paid by claimant to

the United States. That court further held that under Title VII the United States Processing Tax Board of Review did have exclusive jurisdiction thereof.

The Circuit Court of Appeals for the Seventh Circuit held in your petitioner's case that with respect to the same issue (as in the Trunz case above) that if a remedy existed, the federal courts and not the Board had jurisdiction thereof. (R. 93.)

Your petitioner has lost its right to appeal to the federal courts on this question as the statute has tolled. It is unlikely that the district courts or the Court of Claims would entertain jurisdiction if this case could now be taken to those courts. Therefore, your petitioner is without remedy except in praying for the issuance of a writ of certiorari.

It is urged that the decision of the Second Circuit was correct and that of the Seventh Circuit, in conflict therewith, is in error.

II.

The Circuit Court of Appeals for the Seventh Circuit, in the instant case, has decided a federal question in conflict with applicable decisions of this Court and other federal courts.

The majority opinion of the Board, which was sustained by the Circuit Court of Appeals, held that the Board did not have jurisdiction under Title VII of the Revenue Act of 1936, because (1) the petitioner was not the *taxpayer* of the processing taxes in controversy either as to the amount it paid directly to the United States, nor the larger amount paid by it through a third person, and (2) that the *third person* (a public abattoir) *was the taxpayer.*

The processing taxes imposed under the Agricultural Adjustment Act were *excise* taxes. It is well settled, that when this Court and lower federal courts have decided certain

fundamental principles with respect to a particular form of taxation, that Congress recognizes the application of those decisions to subsequent similar legislation. Where Congress intends a proper departure from such decisions, the wording of the statute makes this intent clear. No intent to depart from applicable prior decisions appears in the Agricultural Adjustment Act under which the taxes in controversy were imposed, paid, or collected, nor in Title VII, the remedial statute.

Nowhere do we find a reference in that Act to a *public abattoir,* nor authority to impose a tax upon such person. In the discussion of that Act, including all amendments thereto, by members of Congress, no reference whatsoever is made to a *public abattoir* or *custom slaughterer.*

The assessment of processing taxes from such person was entirely due to an informal ruling of the Commissioner of Internal Revenue. (Internal Revenue Bulletin No. 20, page 19.) (See Argument I of supporting brief, p. 29.) This ruling was in direct conflict with well established Regulations and Treasury Decisions that defined the meaning of *taxpayer* as related to excises. Those Regulations and Treasury Decisions were pursuant to decisions of this Court and lower federal courts.

This question is of great importance here, because had not this informal ruling (in error) been made or followed, it is reasonable to assume that both the Board and the Circuit Court of Appeals would have both held directly opposite to their decision in this case.

In the case of the *Carbon Steel Co.* v. *Lwellyn,* 251 U. S. 501, 64 L. Ed. 375, 40 S. Ct. 283, in construing the meaning of "manufacturer" for tax purposes under the Munitions Tax Act of September 8, 1916, this Court held that the person who was the owner of the material, was the person subject to the tax, notwithstanding the fact that the *owner* had caused a large part of the *manufacturing* or

processing to be performed by subcontractors. (These subcontractors were independent contractors.)

In *Warner-Patterson Co.* v. *U. S.*, 68 Ct. of Cl. 237, that Court held that a corporation, which owned exclusive licenses to manufacture certain lenses, was the manufacturer or producer subject to the excise tax imposed under Section 900 of the Revenue Act of 1924. The corporation did not itself perform *any* labor necessary to produce the lenses. It had engaged other persons (independent contractors) for that purpose.

In the case of *Stahmann, et al.* v. *Vidal*, 305 U. S. 61, 59 S. Ct. 41 (which case arose under the Bankhead Cotton Act), this Court held that the *ginner* (a custom processor, also an independent contractor) was the "collecting agent" for the taxpayer with respect to the tax, and allowed a recovery to the owner of the cotton, who was not a "mere volunteer" with respect to the tax in controversy.

Needless and irreparable injury to petitioner can readily be avoided by the application of the equitable principles laid down by this Court in the Stahmann case.

Petitioner's contention is also supported by the following cases with which the decision of the Circuit Court of Appeals is in conflict.

White v. *Hopkins*, 51 Fed. (2d) 159.

Lukas v. *Kentucky Distillers & Warehouse Co.*, 70 Fed. (2d) 883.

III.

The Circuit Court of Appeals has decided an important question of federal law, which has not been, and should be settled by this Court.

After this Court held the Agricultural Adjustment Act unconstitutional, Congress incorporated Titles III and VII

into the Revenue Act of 1936, which were related to each other and to the Agricultural Adjustment Act. This case has arisen under Title VII of that Act. It has been commonly recognized that those Titles were extremely difficult to understand and to administer. The possibility of administrative and judicial mistakes is great, which, if occur, may operate unfairly either to the Government, claimants, or taxpayers.

This case is one of the first to reach this Court because it is here on a question of jurisdiction. Undoubtedy many other cases involving other questions of law under those Titles will follow. A decision of this Court in the instant case will be of inestimable value in enlightening all persons now struggling with these difficult problems.

The decision of the Circuit Court of Appeals will create greater hardship by its application to Title III. Under the theory that this Court may consider the full effect of its decision not only with respect to the matter at hand, but also that which follows by necessary implication, this problem will be presented in the Brief (Argument III) supporting this petition.

The case of *Arabi Packing Co., Inc.* v. *Commissioner,* 109 Fed. (2d) 278, certiorari denied June 3, 1940, 60 S. Ct. 1093, is not considered controlling nor applicable to this case for the following reasons.

1. The Arabi Co. brought its action in a representative capacity, not for itself as a taxpayer, but entirely for the benefit of others. Title VII of the Revenue Act of 1936 clearly does not provide such a remedy.

2. If recognition is to be given to a public abattoir (custom processor) under Title VII, it is clear that the United States District Courts or the United States Court of Claims have concurrent jurisdiction thereof and not the Board. The Circuit Court of Appeals for the Seventh Circuit in

the instant case has classified the claims arising under Title VII and by its decision supports this contention.

3. The facts and the questions of law presented here are different than those in the Arabi case. Petitioner respectfully contends that important matters are for the first time brought to this Court in its supporting brief.

IV.

Petitioner believes that Title VII of the Revenue Act of 1936 can be reasonably construed to provide an adequate relief to all persons who were *directly* affected by the imposition of the illegal processing taxes. This is a remedial statute.

The intent of Congress was to repeal previously existing procedural methods and to establish a complete, special, and exclusive remedy for all persons on all proper questions with respect to the refunding of processing taxes. (*Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337.)

The doctrine that remedial statutes are to be liberally construed is well established. Federal Courts have repeatedly held that such statutes will be construed to include cases within the reason, although outside the letter of the statute, and to include cases within the letter, but outside the reason. All remedial statutes must be liberally construed if necessary to reach and decide the merits of the case.

In the case of *Knowlton* v. *Moore,* 178 U. S. 41, this Court held that a particular construction must not produce inequality and injustice if another and more reasonable interpretation is possible.

It is well known that in construing remedial statutes, the courts will give due regard for the former law, the defects or evils to be cured or abolished, or the mischief to

be remedied, and the remedy provided should be interpreted liberally.

Jones v. *Virginia*, 25 Fed. 666.
Seigel v. *U. S.* 18 Fed. (Supp.) 771.
Grier v. *Kennan*, 64 Fed. (2d) 605.
Detroit Hotel v. *Brady*, 275 Fed. 995.

The Circuit Court of Appeals recognized that petitioner supplied the funds for payment of all the processing tax in controversy. That Court recognized that part of the tax was paid direct to the United States and the balance paid to C. A. Burnette Company *before that company remitted to the United States.* Yet, that Court found that neither the petitioner nor any other person had a right to a recovery under the provisions of this remedial statute.

Under Title VII, all of petitioner's larger competitors who owned killing floor facilities and slaughtered their own hogs, appear to have the unquestioned right to recover the processing taxes paid by them to the extent of the burden borne. Petitioner seeks justice only. It contends that this statute is unconstitutional in that it discriminates between persons of the same class, or the decision of the Circuit Court of Appeals is in error.

This Court has held that an arbitrary selection can never be justified by calling it a classification. And further held that while there is no requirement that a classification be scientifically accurate, it must be based on something more than a "mere difference." *Gulf C. & F. S. R. T. Co.* v. *Ellis*, 165 U. S. 150.

In the case of *Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 553, this Court held that a classification must not be arbitrary or capricious but should rest upon some reasonable or prevalent economic or social condition which can be used to rationalize the distinguishment thus made.

The simple truth is that petitioner and its larger com-

petitors are all meat packing companies, yet the Circuit Court of Appeals has decided that a remedial statute can give rights to some and deny the same rights to others in the same classification. *To the extent that petitioner paid the tax to the United States,* that Court must be in error. This seems equally true with respect to the balance of the tax which petitioner was compelled to pay through a "collection agent," a "mere funnel," to the United States.

Congress is without power to change a previously existing "Right" under the guise of a change in procedure. At the time the processing taxes were collected, Sections 3226 and 3228 (U. S. C. A.) provided a simple but complete remedy for the recovery of moneys illegally exacted. To substitute therefor a remedy or a procedure which is not fair and reasonable, but which is arbitrary and capricious, can but result in the taking of property without due process, and is in violation of the Fifth Amendment to the Constitution of the United States (*Combes* v. *Getz,* 285 U. S. 434; *Ettor* v. *Tacoma,* 280 U. S. 148; *Knickerbocker Trust Co.* v. *Meyers,* 133 Fed. 764).

Section 901 of Title VII repeals Sections 21 (d), 21 (e), and 21 (g) of the Agricultural Adjustment Act. Section 910 of Title VII purports to eliminate the right to sue the Collector with respect to processing taxes wrongfully collected by him, which *right* had existed prior thereto.

Of the processing taxes in controversy, $2,589.13 (R. 43, 44) was paid directly to the Collector upon his demand and no part thereof has ever been refunded. Processing taxes in the amount of $13,711.23 (R. 19, 43) were also paid directly to the Collector, and no part thereof was refunded in such a way so that it was available for the use or benefit of the petitioner. Therefore, it is contended that a *right* existed prior to the enactment of Title VII, which Congress could not destroy. It is submitted that unless Title VII provides a full and adequate remedy for the recovery

thereof, then it is unconstitutional as conflicting with the Fifth Amendment.

The interpretation of Title VII is not simplified by the provision contained in Section 902 (b) thereof, which provides for the refund of processing taxes to a vendor, under certain conditions, providing he has repaid unconditionally such amount to his vendee. Section 902 (b) does not apply to the facts in this case, nor is any actual relief provided thereunder for your petitioner.

There was never a possibility that C. A. Burnette Company could make an *unconditional repayment* of the processing tax in controversy to the petitioner and others similarly circumstanced. It was financially unable to make such a repayment. The condition if applicable was one that was impossible to perform.

It is contended that C. A. Burnette Company was not the vendor of the petitioner, but was the "collection agent" for the United States with respect to the processing taxes paid through it.

Respectfully submitted,

RAYFORD W. LEMLEY,
Attorney for Petitioner.